No. 12,389

In the United States Court of Appeals for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLANT

v.

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLEES

and

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLANTS

v.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLEE

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION, APPELLANT

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OPINION BELOW

The opinion of the district court (R. 357-367) is not reported.

JURISDICTION

This is an appeal from a judgment entered June 11, 1949 (R. 391-397). On August 9, 1949, the Reconstruction Finance Corporation filed notice of appeal (R. 403). The jurisdiction of the district court rests upon sec. 3 of the Act of January 22, 1932, 47 Stat. 5, as amended, 15 U. S. C. sec. 603, and sec. 12 of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C. sec. 42, now 28 U. S. C. sec. 1349. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether an order of the War Production Board directing cessation of mining and milling operations on land leased to a wholly owned government corporation compelled the corporation to cease these operations and thus—as the lease provided—relieved it of the obligation to pay a minimum royalty.

2. Whether damages for continuing to occupy land after termination of a lease are to be measured by a minimum royalty paid as compensation not only for occupancy of the land but also for the right to extract the minerals it contains.

3. Whether the Reconstruction Finance Corporation is liable for the occupancy of property occurring after it has been succeeded as occupant by the United States acting through the War Assets Administration.

STATEMENT

The provisions of the judgment below (R. 391-397) to be reviewed on this appeal award appellees (a) $21,166.66 for minimum royalties held to be due for the period January 1, 1944-March 1, 1946, by virtue of a lease that was terminated on the latter date, and (b) $17,055.44, held to be the reasonable rental value of the leased property from termination of the lease to

the date of trial, i.e., from March 1, 1946, to November 14, 1947.

The lease in question was granted by appellees to the Metals Reserve Company. By section 5 of the Act of June 25, 1940, 54 Stat. 573, appellant, the Reconstruction Finance Corporation, had been authorized—

> (2) When requested by the Federal Loan Administrator, with the approval of the President, to create or to organize a corporation or corporations, with power (a) to produce, acquire and carry strategic and critical materials as defined by the President, (b) to purchase and lease land, to purchase, lease, build, and expand plants, and to purchase and produce equipment, supplies, and machinery, for the manufacture of arms, ammunition, and implements of war, (c) to lease such plants to private corporations to engage in such manufacture, and (d) if the President finds it is necessary for a Government agency to engage in such manufacture, to engage in such manufacture itself. * * *

Three days later, pursuant to this authority, appellant created the Metals Reserve Company. 6 F. R. 2970. The principal office was at Washington, D. C., and all the capital stock was subscribed for by appellant. This was done for the purpose of acquiring and carrying a reserve supply of critical and strategic materials.

The lease (Ex. A, R. 14-36) was made December 20, 1941. It covered three patented and 25 unpatented lode and placer mining claims (R. 15-18). In addition to exclusive possession, Metals Reserve Company was granted "the right to explore, mine and extract and remove from said leased mining claims chromite or other chromium bearing ores and any other minerals, metals, precious stones or rocks found in, on or under said leased premises * * * (par. 1, R. 18).

An advance royalty of $10,000 was payable on or before February 1, 1942 (par. 2, R. 19). Extracted min-

erals were to be paid for at specified rates (par. 3, R. 19-21). Beginning January 1, 1943, a minimum annual royalty of $10,000 was to be paid in quarterly instalments (par. 7, R. 23-24). However—

> should Lessee's construction or development or mining or milling operations or any other operation hereunder be suspended because of any of the causes or reasons set forth in Paragraph 24 hereof Lessee's obligation to pay a minimum royalty as aforesaid shall be suspended during any and all periods where such causes or reasons exist and the obligation to pay such minimum royalty shall be reduced in such proportion as the period of suspension of operations bears to the entire calendar year.

Paragraph 24 declared (R. 30-31):

> Anything in this lease contained to the contrary notwithstanding, any * * * requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise * * * force majeure, * * * and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of Lessee or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist.

The lease accorded lessors free access to the premises so that they might examine into production and the records thereof (R. 25-26). They could cancel for lessee's failure to pay royalties (par. 13, R. 27-28).

> If default is made, * * * then Lessors may serve notice on Lessee demanding that payment be made within thirty days, and if payment is not made and the default remedied within thirty days after receipt of said notice by Lessee, Lessors may forthwith declare this lease terminated and ended and

> the Lessors shall then be entitled immediately to re-enter and take possession of the demised premises * * *.

On the other hand, the lessee could terminate the lease on 90 days' notice and payment of $1000 (par. 14, R. 28). If not terminated, the lease was to endure 10 years (R. 18).

So much for the terms of the lease. Metals Reserve Company employed the Anaconda Mining Company to develop and operate the property. For this purpose the Defense Plant Corporation[1] under Plancor No. 587 provided funds in excess of $8,000,000.[2] The $10,000 advance royalty was paid (R. 50). As a result of mining and milling operations during 1943, royalties pursuant to paragraph 3 of the lease exceeded the minimum royalty due for that year (R. 39). Before any more royalties were due, payments ceased. *They ceased because, complying with an order of the War Production Board, the lessee ceased to mine the leased premises.*

At this point, it is appropriate to set out the authority of the War Production Board to make such an order and the facts establishing that it did so.

The War Production Board had been established by the President on January 16, 1942, Executive Order No. 9024, 7 F. R. 329. The full text of the Order is printed in the Appendix, pp. 24-26, *infra*. Section 2 thereof provided that the Chairman should "(a) Exercise general direction over the war procurement and pro-

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[1] Defense Plant Corporation was created by appellant on August 22, 1940. 6 F.R. 2971. Its organization was also authorized by section 5 of the Act of June 25, 1940, 54 Stat. 573.

[2] "Plancor" was the term used by Defense Plant Corporation to designate the projects built or financed by it. For identification, each Plancor was given a number. Plancor No. 587 comprised the mine and mill transmission lines, an access road and auxiliary facilities including dwellings (R. 281; see also Fdg. XIII, R. 386-387). The improvements are listed in detail in Ex. 20, R. 194-197.

duction program" and "(b) Determine the policies, plans, procedures and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production * * * and issue such directives in respect thereto as he may deem necessary or appropriate." Section 3 directed that: "Federal departments, establishments and agencies shall comply with the policies, plans, methods and procedures in respect to war procurement and production as determined by the Chairman * * *." Section 5 stated: "The Chairman may exercise the powers, authority and discretion conferred upon him by this Order through such officials or agencies * * * as he may determine * * *".

On February 24, 1942, by Executive Order No. 9071, the President had transferred to the Department of Commerce, to be administered under the direction of the Secretary of Commerce, the functions, powers and duties of the Metals Reserve Company (Ex. 16, R. 186-188, 7 F. R. 1531).[3] And on July 5, 1943, the Chairman of the War Production Board had instructed the Secretary to accept the signature of Mr. Hiland G. Batcheller as Operations Vice Chairman "on recommendations that are made by the War Production Board to the [appellant] and its subsidiaries" (Ex. 14, R. 176).

The order of the War Production Board requiring Metals Reserve Company to stop mining and milling operations on the leased properties was in the form of a letter, dated September 13, 1943, from Mr. Batcheller to the Secretary (Ex. 7, R. 160-164). Mr. Batcheller pointed out that the development of Montana chromite deposits had been undertaken when enemy activity

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[3] The Honorable Jesse H. Jones was Secretary of Commerce. He was also chairman of the board of directors of Metals Reserve Company, the lessee, and of Defense Plant Corporation, which financed the development of the leased premises.

had threatened to cut off our usual foreign sources of supply of chromite. He went on to say:

> It should be noted that the Montana chrome concentrates are very much inferior to imported grades of chromite. * * * We view the Montana chromite development now only as insurance against some future emergency * * *.

The letter concluded (R. 163-164):

> In view of the present stringent manpower situation and the lack of need for Montana concentrates as outlined above, we believe it advisable to divert the men now employed in mining low grade concentrates in Montana into the production of more critically needed materials such as copper and zinc. We, therefore, request that you shut down all operations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both operations could be revived in the event that the chromite picture should change for the worse.

Accordingly, on September 16, 1943, lessee wired the Anaconda Copper Mining Company to: "Close down Mouat mine as quickly as orderly transfer of personnel to more critical mineral production will permit with view of stopping milling approximately November first" (Ex. 17, R. 189-190; see also R. 190-194).

On December 11, lessee notified appellees of the order of the War Production Board (Ex. 13, R. 174-175). Its letter concluded:

> As you know, Metals Reserve Company, as a federal agency created to aid the Government of the United States in the national defense program and war effort, is obligated to comply with the policies, plans, methods and procedures in respect to war procurement and production as determined by the Chairman of the War Production Board. Under

> the circumstances Metals Reserve Company has complied with the above mentioned directive and has suspended all operations in and about the premises covered by the above mentioned lease and commonly known as the "Mouat-Sampson properties". A crew of men is being maintained to protect the property.[4]

Operations were never resumed. On October 6, 1944, the War Production Board, in a letter to the Secretary of Commerce signed by Philip D. Wilson who had succeeded to the duties of Mr. Batcheller (Ex. 14, R. 179), directed that the Mouat-Sampson properties be continued in standby condition (Ex. 9, R. 166-167).[5] On April 14, 1945, the Board notified the appellant that the property of Plancor No. 587 was no longer necessary for the war effort (Ex. 11, R. 168-170) and on November 2, 1945, it recommended that appropriate action be taken in respect of the lease (Ex. 12, R. 170-171). Accordingly, under date of November 15, 1945, appellant notified appellees that the lease was cancelled as of February 28, 1946 (Ex. 15, R. 184-185).[6] Thereafter, appellant declared the property surplus (Ex. 20, R. 194-197; R. 281) and on August 31, 1946, it was notified that: "The United States of America, acting by and through the

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[4] On April 8, 1944, lessee again wrote to appellees. Apparently, the letter was provoked by an inquiry from appellees as to when they might expect payment of minimum royalty. Appellees were reminded that on December 11, 1943, they had been notified that operations on the properties had been suspended and consequently that lessee had been relieved of the obligation to pay minimum royalty (Ex. 13, R. 172-173).

[5] An earlier letter, dated March 8, 1944, was to the same effect. Ex. 8, R. 164-165. See also a subsequent letter, dated February 24, 1945. Ex. 10, R. 167-168.

[6] By the Act of June 30, 1945, 59 Stat. 310, the Metals Reserve Company (as well as the Defense Plant Corporation and certain other corporations created by the Reconstruction Finance Corporation) was dissolved and all its functions, powers, duties and authority, together with its assets and liabilities, were transferred to Reconstruction Finance Corporation.

War Assets Administrator hereby accepts the custody, protection and maintenance of Plancor 587 * * * as of the close of business this day," (Ex. 22, R. 208; see also R. 209-211).

On September 17, 1946, appellees commenced this suit, naming as defendants the appellant and the War Assets Administration (R. 2-14). So far as here material, the complaint alleged a failure to pay minimum royalties for the period beginning January 1, 1944, and ending February 28, 1946, and retention of possession of the leased premises since the latter date. A motion to dismiss the War Assets Administration on the ground it was not subject to suit (R. 36) was granted (R. 44-45). The cause was tried by the district judge without a jury (R. 46-357). The greater part of the testimony was devoted to matters not involved on this appeal: the condition of dwellings constructed by lessee on the leased premises (R. 69-79, 84-136, 137-139, 233-240, 260-279) and the circumstances under which the lease was negotiated (R. 212-230, 294-309).

In addition appellees testified that they lived near the leased property (R. 50, 141) and that during the period of the lease Malcolm Mouat had been often upon them (R. 69-70, 141, 143, 155). They testified also that after March 1, 1946, the date the leases terminated, the road built by lessee from the entrance to the mine site was guarded and that they could not enter without showing the passes which had been issued to them (R. 53, 63, 83). This road was the only passageway through the premises for automobiles (R. 52, 143, 242). Appellees further testified that at one point a chain was stretched across the road (R. 51, 57). *They offered no testimony as to the fair rental value of the premises.*

Appellant introduced—with cognate documents—the War Production Board order of September 13, 1943, closing down mining and milling operations, the Metals

Reserve Company letter of December 11, 1943, notifying lessors of the order and the consequent suspension of mining and milling operations, the letter of November 15, 1945, canceling the lease, and the letter of August 31, 1946, notifying appellant that the United States had taken over maintenance, custody and control of the property on the leased premises. In addition testimony was offered to show that entrance to the premises was restricted for the purpose of guarding government property and keeping out those having no business on the premises (R. 241, 248, 289). Witnesses for appellant expressed the opinion that the mine could not profitably operate (R. 230-231) and had no commercial value (R. 240).

On June 11, 1949, the judge made findings of fact (R. 378-389) which—insofar as they are acceptable to appellant—merely summarized the foregoing. In addition, he found:

> VII. The defendant failed to introduce sufficient evidence at the trial to show that any act occurred sufficient to relieve the defendant, or its predecessor, the Metals Reserve Company, from the duty to pay minimum royalty under paragraph 24, and the burden of proof as hereafter found in Conclusions of Law, is upon the defendant to show absolution by reason of any exception set out in paragraph 24 of the lease. Lessee agreed in the lease to carry on "its operations diligently." (R. 384).
>
> XVIII. That the reasonable rental value of the premises described in the lease agreement, during the period from March 1, 1946, to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand ($10,000) Dollars per year. (R. 388).

Accordingly, he entered judgment that appellees recover from appellant $21,666.66 on account of minimum

royalties and $17,055.44 for occupancy of the premises from March 1, 1946, to the end of the trial.

SPECIFICATIONS OF ERROR

1. The district court erred in finding as follows:

VII. The defendant failed to introduce sufficient evidence at the trial to show that any act occurred sufficient to relieve the defendant, or its predecessor, the Metals Reserve Company, from the duty to pay minimum royalty under paragraph 24, and the burden of proof as hereafter found in Conclusions of Law, is upon the defendant to show absolution by reason of any exception set out in paragraph 24 of the lease. Lessee agreed in the lease to carry on its operations diligently.

2. The district court erred in finding as follows:

X. The lease provided that upon the termination, lessee should surrender peaceably the leased premises and appurtenances in good order with the maintenance of possessory claims and rights and permits fully met, and that lessors should have the right to re-enter upon the leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof. That the lessee has not surrendered the said premises, or any part thereof, to the lessors; that lessee, by show of force, and armed guards and servants in possession, has wrongfully withheld the possession of the said premises, and all thereof, from the plaintiffs, and this up to the conclusion of the evidence in this case, towit: November 14th, 1947.

3. The district court erred in finding as follows:

XIV. The amount equalling the minimum rental due and unpaid during the period the defendant has held wrongfully the premises from March 1st, 1946, until the trial, is Seventeen Thousand, Fifty-five and 44/100 ($17,055.44) Dollars.

4. The district court erred in finding as follows:

> XVIII. That the reasonable rental value of the premises described in lease agreement, during the period from March 1, 1946, to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand ($10,000) Dollars per year.

5. The district court erred in holding that appellant was liable for minimum royalties from January 1, 1944, to February 28, 1946, pursuant to the agreement of December 20, 1941.

6. The district court erred in holding that appellant was liable to appellee at the rate of $10,000 a year for occupancy of the leased premises from March 1, 1946, to November 14, 1947.

7. The district court erred in entering judgment for appellee in the sum of $38,722.10 with interest.

SUMMARY OF ARGUMENT

I

The trial court erred in holding appellant liable for minimum royalty after January 1, 1944. The obligation to pay minimum royalty was suspended if mining and milling operations were suspended by government order. The trial court found (VII, R. 384) that appellant "failed to introduce sufficient evidence * * * to show that any act occurred sufficient to relieve" lessee, Metals Reserve Company, of the duty to pay minimum royalty. There is no support for this finding. The War Production Board letter of September 13, 1943, to the Secretary of Commerce from H. G. Batcheller (Ex. 7, R. 160-164) was a government order compelling lessee to cease mining and milling operations.

Executive Order No. 9024 (Appendix, pp. 24-26, *infra*) gave the Chairman of the War Production Board

power to determine the policies, plans, procedures and methods of the several Federal Departments, establishments and agencies in respect of the war procurement and production program. Among these agencies was lessee. The Chairman had delegated Mr. Batcheller to act for him and the Secretary of Commerce was in charge of lessee. The order therefore was legally indistinguishable from one signed by the Chairman and directly addressed to lessee. Its force or effect was not impaired by the circumstance that the Board chose to "request" rather than to "instruct" or "direct".

Although the trial court did not find to the contrary, the letter from lessee to lessors dated December 11, 1943, stating that lessee "has suspended" all operations (Ex. 13, R. 174-175) constitutes affirmative evidence that operations ceased before January 1, 1944. *This statement has never been challenged and cannot be.* There was no reason for lessee to misrepresent the fact. But, had it done so, appellees—who knew the truth—would have so testified.

II

Similarly, the trial court erred in finding (XVIII, R. 388) that from March 1, 1946 (when the lease terminated) until November 14, 1947, the premises described in the lease had a fair rental value of $10,000 a year. There is no evidence to support this finding. Appellees introduced no evidence on the matter and appellant's witnesses testified the premises had no rental value.

In fixing rental value at the minimum royalty, the court overlooked the facts that the minimum royalty was compensation for the grant to lessee of the right to extract minerals and that, when the lessee had no right to extract minerals, it could occupy the property without charge.

After the lease terminated, appellant did not claim—or exercise—the profit *a prendre*. As this Court has held, mere possession of mineral-bearing land does not carry with it a right to extract the minerals and so does not make the occupant liable to the owner for the value of that right. *O'Connor* v. *United States,* 155 F. 2d 425 (1946). Obviously, therefore, the amount which would be exacted for a profit *a prendre* has no tendency to indicate what could be obtained from one merely occupying the land.

III

In any event, the trial court erred in holding appellant liable for occupancy after August 31, 1946. Appellant's occupation ended on that day when the United States, acting through the War Assets Administration, took "custody, protection and maintenance" (Ex. 22, R. 208). As this Court has held (*United States* v. *Shofner Iron & Steel Works,* 168 F. 2d 286) the United States thereby took possession of the property and appellant retained merely a barren legal title for the use of the United States. The latter—if anyone—is chargeable for subsequent occupancy.

ARGUMENT

I

The Obligation to Pay Minimum Royalties After 1943 Was Suspended by the War Production Board Order of September 13, 1943

The lease suspended the obligation to pay minimum royalty in the event mining or milling operations ceased for any of the reasons set forth in paragraph 24. Among the reasons set forth in paragraph 24 were "any * * * requirement, regulation, restriction or other act of any government." In other words, if mining and milling operations were prohibited by government order, the

obligation to pay minimum royalties was suspended. The trial court, however, said that it could not "find sufficient evidence of an order from one in authority to the lessee or successor calling for a cessation of operations under the lease and fixing the time and circumstances when such an event would take place." (R. 360). Thus it found that appellant "failed to introduce sufficient evidence * * * to show that any act occurred sufficient to relieve" the lessee of the duty to pay minimum royalty (Fdg. VII, R. 384).

There is no support whatever for this finding. As the Statement shows (pp. 6-7, *supra*) the War Production Board letter of September 13, 1943, addressed to the Secretary of Commerce and signed by Mr. H. G. Batcheller (Ex. 7, R. 160-164) compelled lessee to cease operations on the leased property.

The power of the Board—or its Chairman—to order the cessation of operations cannot be questioned. Executive Order No. 9024 (Appendix, pp. 24-26, *infra*) establishing the Board gave its Chairman general direction of the war procurement and production program, directed him to determine the policies, plans, procedures and methods of the several Federal Departments, establishments and agencies in respect of that program and to issue appropriate directives (sec. 3) and—to emphasize the mandate—ordered the Federal Departments, establishments and agencies to comply with the Chairman's determinations (sec. 4). Among these agencies was the Metals Reserve Company, created by the Reconstruction Finance Corporation by authority of Congress and wholly owned by the United States (6 F. R. 2970).

It is equally plain that the Board issued an order to Metals Reserve. The Chairman, empowered to act through agents chosen by him (sec. 5, Exec. Order No. 9024), had instructed the Secretary of Commerce to ac-

cept the signature of Mr. Batcheller on recommendations made by the Board to Metals Reserve (Ex. 14, R. 176). This instruction was directed to the Secretary because he had charge of the Metals Reserve (Ex. 16, R. 186-188). Thus, the letter of September 13, 1943, from Mr. Batcheller, the agent of the Chairman of the War Production Board, to the Secretary of Commerce, controlling the Metals Reserve Company, is legally indistinguishable from one signed by the Chairman of the War Production Board and directly addressed to Metals Reserve—or to Mr. Jones in his other role as chairman of that board of that company. See *United States* v. *Phelps,* 40 F. 2d 500 (C. C. A. 2, 1930); *Cooper* v. *O'Connor,* 99 F. 2d 135 (App. D. C., 1938), certiorari denied 305 U. S. 643.

The letter compelled Metals Reserve Company to cease mining and milling operations of the leased property. After showing the inadvisability of continuing production, it said: "We, therefore, request that you shut down all operations." The Board had determined on a shut-down. It transmitted this decision to the official who controlled the lessee, the Secretary of Commerce. That official was under compulsion to obey the decision. In this context, the circumstance that the Board chose to "request" rather than to "instruct" or "direct" does not impair the force or effect of the order. See e.g., *Estate of Lawrence,* 17 Cal. 2d 1, 7, 108 P. 2d 893 (1941). "A request from one in authority is understood to be a mere euphemism; it is in fact a command in an inoffensive form." *State* v. *Scheve,* 65 Neb. 853, 880, 93 N. W. 169 (1902). Indeed, the choice of this form of expression was particularly appropriate in view of the fact that the direction was addressed to a cabinet officer.

It is therefore clear that the trial court failed to give effect to the War Production Board letter of September

13, 1943, and accordingly erred in finding that the evidence did not show that beginning January 1, 1944, the lessee was relieved of the obligation to pay minimum royalty.

There are intimations in the opinion of the trial court (R. 360-361)—but not in its finding—to the effect that it was in doubt as to exactly when mining and milling operations ceased. Since the finding does not incorporate these intimations, it is evident they did not influence the court. Nonetheless, it is just as well to clear up any misgivings.

The record does not show the precise date in 1943 when operations ceased. But it does affirmatively show that the event occurred before January 1, 1944, i.e., before the beginning of the period for which minimum royalty was awarded in this suit. Thus, in its letter of December 11, 1943, Metals Reserve notified lessor that it "has suspended" all operations (Ex. 13, R. 174-175).[7] *This statement was not questioned, much less contradicted, by lessors either then or in the complaint or at the trial.* In the nature of things it could not be challenged. In the first place it is unthinkable that the statement was an untruth. There was no reason why the Metals Reserve Company should misrepresent the fact. At a time when billions were being spent, it did not concoct a lie for the purpose of cheating lessors out of $2500 each quarter year. In the second place, the lessors were in a position to know the facts. They lived in the neighborhood (R. 50, 61) and by the terms of the lease were given free access to the premises and the right to examine production records. Appellee Malcolm Mouat testified that, since the execution of the lease, he had

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[7] In its second letter to lessee dated April 8, 1944 (see Fn. 4, p. 8, *supra*) the lessee said: "Under date of December 11, 1943, we informed you that, pursuant to action taken by the War Production Board, operations at the [leased] properties had been suspended."

been on the property many times (R. 141, 143-144, 155). If operations had continued into 1944 and beyond, he would have known and surely would have so testified. Moreover, it is safe to suppose that long before this suit was brought he and the other lessors would have charged a default and availed themselves of the provisions of the lease calling for its termination.

It is submitted that the court below erred in holding appellant liable for minimum royalties after January 1, 1944.

II

There Is No Evidence to Support the Finding That After Termination of the Lease the Reasonable Rental Value of the Property Was $10,000 a Year

In addition to awarding appellees minimum royalties until the termination date of the lease, the trial court gave them damages at the rate of $10,000 a year from March 1, 1946, to November 14, 1947. It based this further award upon its finding that "the reasonable rental value of the premises described in the lease agreement * * * from March 1, 1946 to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand ($10,000) Dollars per year" (Fdg. XVIII, R. 388). This part of the judgment is erroneous because, (1) there is no evidence to support the finding as to the fair rental value of the property and, (2) in any event appellant Reconstruction Finance Corporation cannot be liable after August 31, 1946, because as the Statement shows (pp. 8-9, *supra*) on that date the United States through the War Assets Administrator accepted "custody, protection and maintenance" of the property. The first of these points will be made under this heading of the brief and the second under the next.

As the Statement emphasized (p. 9, *supra*) appellees (whose complaint made no claim for damages

occasioned by occupation after the lease terminated) introduced no evidence as to the fair rental value of the premises. Appellant's witness testified that the property had no rental value (R. 240). In its opinion, the trial court disclosed the reasoning which led it to make Finding XVIII. It said (R. 362):

> If the property was practically worthless, as asserted by defendant, it is difficult to understand how that would afford any justification for withholding possession from the lessors in violation of the express terms of the lease. As it seems to the court, the minimum royalty should stand for rental against the defendant for not complying with the terms of the lease in delivery of possession after termination thereof, and the court will so decide the issue.

The error is apparent. Of course, the fact that property is worthless does not justify a trespasser. But it is equally clear that the fact of worthlessness shows that the owner sustains only nominal injury by being kept out of possession and consequently limits the pecuniary liability of the trespasser to nominal damages. On the other hand, if an agreement has been made as to the rent to be paid for leased property, that rent fairly may be taken as evidence of the value of occupancy and may be used to measure damages for a withholding of possession after the lease terminates.

In the case at bar, however, there was no warrant for treating the "minimum royalty" as evidence of the value of occupancy of the lessors' property. In addition to that occupancy, lessors gave lessee "the right to explore, mine and extract and remove from said leased mining claims" all minerals found therein. Moreover, under the terms of paragraph seven of the lease the minimum royalty was not payable if production ceased, i.e., if the profit *a prendre* was not exercised, by reason of an event specified in paragraph 24.

In that event, lessee would pay nothing for occupying the premises. Thus—wholly apart from the question of when and in what circumstances the payment of minimum royalties would be suspended—it is evident that the lease contemplated uncompensated occupancy of the leased property. In other words, the parties were agreed that, unless the lessee had the right to exercise its profit *a prendre,* it did not profit, nor lessee lose, by its occupation of the property.

While appellant occupied the premises after the lease terminated, it did not claim (and of course did not exercise) the right to take minerals therefrom. And, as this Court has held, mere possession of mineral-bearing land does not carry with it a right to extract the minerals and consequently does not make the possessor liable to the owner for the value of that right. *O'Connor* v. *United States,* 155 F. 2d 425 (1946). Accordingly, appellant is not liable to the lessors for the value of a profit *a prendre.* Obviously, then, the amount which Metals Reserve Company agreed to pay for the grant of a profit *a prendre* does not show—indeed has no tendency to indicate—what rental could be obtained for the occupancy of the land. It follows that in using that amount as the reasonable rental value of the land the trial court erred and that its finding of reasonable rental value has no evidence to support it.

III

In Any Event Appellant Is Not Liable for Occupancy After September 1, 1946

Appellant's occupation of lessees' premises was necessitated by the fact that, in consequence of the dissolution of Defense Plant Corporation,[8] it had in its charge the properties of Plancor No. 587. However, as of the

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[8] See fn. 6, p. 8, *supra.*

close of business on August 31, 1946, the United States acting by the War Assets Administrator took "custody, protection and maintenance" of those properties [9] (Ex. 22, R. 208). Thus, by being divested of the properties of the Plancor, appellant's occupation of the premises was terminated. In holding it liable for subsequent occupancy, the trial court has made appellant financially responsible for events over which it exercised no control. Therefore it erred.

If authority to support reason is necessary, it is supplied by this Court's decision in *United States* v. *Shofner Iron & Steel Works,* 168 F. 2d 286 (1948). There (as here) property built by Defense Plant Corporation and on its dissolution transferred to appellant was by the latter declared surplus and transferred to War Assets Administration. An action brought by the United States to recover possession of the property from the

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[9] The Surplus Property Act of 1944, approved October 3, 1944, 58 Stat. 765, 50 U.S.C. sec. 1611 et seq., created a Surplus Property Board, sec. 5(a), gave it general supervision and direction over the care and disposition of surplus property, sec. 6, and directed it to designate "disposal agencies," sec. 10. Section 11, 50 U.S.C. sec. 1620, provided that owning agencies should report to the appropriate disposal agency all surplus property in their control and that "the disposal agency shall have responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition in accordance with regulations prescribed by the Board."

The Act of September 18, 1945, 59 Stat. 533, transferred the Board's functions to Surplus Property Administration, headed by an Administrator. In time the War Assets Corporation became the chief disposal agency (R. 202).

The policy-making and disposal functions were consolidated by Executive Order No. 9689 (Ex. 21, R. 197-201). Thereby, effective February 1, 1946, the functions of the Surplus Property Administrator and his Administration were transferred to the Chairman of the Board of War Assets Corporation and that Corporation. Effective March 25, 1946, the War Assets Administration headed by an Administrator was established and was assigned the functions of War Assets Corporation and its Chairman. Accordingly, the War Assets Administrator had the authority—conferred by section 11 of the Surplus Property Act of 1944—to care for, handle and dispose of surplus property.

former lessee was dismissed on the ground that the United States was not the real party in interest. This Court reversed. It said (168 F. 2d at p. 287):

> Having declared the property surplus to its needs and responsibilities, [Reconstruction Finance Corporation] retains no more than the barren legal title for the use of the United States to be transferred wherever the latter may direct. The responsibility and authority for disposing of the property and for its care and handling pending disposal are by the terms of the Surplus Property Act vested in War Assets Administration, an executive arm of the government, and Congress could not but have intended that the Administration take possession of property declared surplus whenever it deemed that course necessary or expedient.

Since the War Assets Administration has—as Congress intended—taken *possession* of the properties of Plancor No. 587 and has left in appellant "no more than the barren legal title for the United States to be transferred wherever the latter may direct," it is evident that since September 1, 1946, the United States has occupied the premises. If anyone is chargeable for that occupancy it is the United States.

Accordingly, it is submitted that in any event appellant may not be held for occupation of the premises after August 31, 1946.

CONCLUSION

For the foregoing reasons, it is submitted that the provisions of the judgment appealed from which award appellant $21,166.66 for minimum royalties and $17,055.44 for the reasonable rental value of the premises should be reversed.

Respectfully,

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FEBRUARY 1950.

APPENDIX

7 F.R. 329

Executive Order

Establishing the War Production Board in the Executive Office of the President and Defining Its Functions and Duties

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to define further the functions and duties of the Office for Emergency Management with respect to the state of war declared to exist by Joint Resolutions of the Congress, approved December 8, 1941, and December 11, 1941, respectively, and for the purpose of assuring the most effective prosecution of war procurement and production, it is hereby ordered as follows:

1. There is established within the Office for Emergency Management of the Executive Office of the President a War Production Board, hereinafter referred to as the Board. The Board shall consist of a Chairman, to be appointed by the President, the Secretary of War, the Secretary of the Navy, the Federal Loan Administrator, the Director General and the Associate Director General of the Office of Production Management, the Administrator of the Office of Price Administration, the Chairman of the Board of Economic Warfare, and the Special Assistant to the President supervising the defense aid program.

2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Exercise general direction over the war procurement and production program.

b. Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and

production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

c. Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875 [1] of August 28, 1941.

d. Supervise the Office of Production Management in the performance of its responsibilities and duties, and direct such changes in its organization as he may deem necessary.

e. Report from time to time to the President on the progress of war procurement and production; and perform such other duties as the President may direct.

3. Federal departments, establishments, and agencies shall comply with the policies, plans, methods, and procedures in respect to war procurement and production as determined by the Chairman; and shall furnish to the Chairman such information relating to war procurement and production as he may deem necessary for the performance of his duties.

4. The Army and Navy Munitions Board shall report to the President through the Chairman of the War Production Board.

5. The Chairman may exercise the powers, authority, and discretion conferred upon him by this Order through such officials or agencies and in such manner as he may determine; and his decisions shall be final.

6. The Chairman is further authorized within the limits of such funds as may be allocated or appropriated to the Board to employ necessary personnel and make provision for necessary supplies, facilities, and services.

7. The Supply Priorities and Allocations Board, established by the Executive Order of August 28, 1941, is hereby abolished, and its personnel, records, and

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[1] 6 F.R. 4483.

property transferred to the Board. The Executive Orders No. 8629 [2] of January 7, 1941, No. 8875,[1] of August 28, 1941, No. 8891 [3] of September 4, 1941, No. 8942 [4] of November 19, 1941, No. 9001 [5] of December 27, 1941, and No. 9023 [6] of January 14, 1942, are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
January 16, 1942
[No. 9024]

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[2] 6 F.R. 191.
[3] 6 F.R. 4623.
[4] 6 F.R. 5909.
[5] 6 F.R. 6787.
[6] 7 F.R. 302.

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